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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-857

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR THE PETITIONER

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BRIEF FOR PETITIONER

Evco, a New Mexico corporation, d/b/a/ Evco Instructional Designs, Petitioner, herewith submits its brief in support of the Writ of Certiorari to the Court of Appeals of the State of New Mexico.

OPINIONS BELOW

The first opinion in *Evco* v. *Jones, et al.*, is reported in 81 N.M. 724, 472 P.2d 987 (1970). Writ of Certiorari to the Court of Appeals of the State of New Mexico was granted in No. 928, October Term, 1970. 402 U.S. 969, 91 S. Ct. 1655, 29 L.Ed. 2d 134 (1971). The second opinion of the Court of Appeals of the State of New Mexico is reported in 83 N.M. 110, 488 P.2d 1214 (1971). Both opinions and the Writ of Certiorari appear in Appendix B of the Petition for Writ of Certiorari filed herein.

JURISDICTION

The Court of Appeals of the State of New Mexico on remand, rendered the Judgment by Opinion on July 30, 1971. Rehearing was denied August 24, 1971. Application for Writ of Certiorari was denied by the Supreme Court of the State of New Mexico on September 29, 1971. Thereupon, the Final Order was entered by the Court of Appeals of the State of New Mexico on September 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES, RULES AND REGULATIONS INVOLVED

The statutory provisions involved are Art. I, Sec. 8, Cl. 3 of the United States Constitution; and Sec. 72-16A-14.10, N.M.S.A., 1953 Comp. (July 1, 1967). New Mexico Bureau of Revenue G. R. Regulation 14.10-2 is involved as representing the Bureau's subsequent interpretation of the question presented herein.

QUESTIONS PRESENTED

(1) Whether Petitioner's gross receipts from sales of tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, are exempt from New Mexico Emergency

School Tax and New Mexico Gross Receipts Tax as being sales of interstate commerce.

STATEMENT

Direct appeal to the Court of Appeals of the State of New Mexico was taken by Petitioner taxpayer from a written order of Respondent Commissioner of Revenue, pursuant to Sec. 16-17-8 (F), N.M.S.A., 1953 Comp. (Supp. 1969), and Sec. 72-13-39, N.M.S.A., 1953 Comp. (Repl. 10, pt. 2, Supp. 1969). The case was presented to the lower Court upon a Stipulation of Facts.

In its opinion the lower Court decided that Petitioner was involved in the production or creation of tangible personal property, and that sales thereof to the United States, the State of New Mexico, their departments and instrumentalities, and sales to certain non-profit organizations, were exempt from the Emergency School Tax Act and the Gross Receipts Tax Act, by virtue of Sec. 72-16-5, N.M.S.A., 1953 Comp., and Sec. 72-16A-14.G, N.M.S.A., 1953 Comp.

In its opinion the Court further held that Petitioner's gross receipts from sales of such tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, are not exempt from the Emergency School Tax Act and the Gross Receipts Tax Act as being sales in interstate commerce. On June 17, 1970, both Petitioner and Respondent filed Motions for Rehearing. Both Motions for Rehearing were denied on July 7, 1970. On July 20, 1970 Respondent filed a Petition for Writ of Certiorari to the Court of Appeals of New Mexico in the Supreme Court of New Mexico. Petitioner filed its Response to Petition for Writ of Certiorari-Petition for Writ of Certiorari. The Supreme Court entered its Order denying both Petitions for Writ of Certiorari on July 31, 1970. Thereupon, the Final Order of the Court of Appeals was entered August 4, 1970.

Although Respondent in its Motion for Rehearing and Petition for Writ of Certiorari continued to assert its position that the subject matter of Petitioner's sales was the sale of "services" rather than the sale of "tangible personal property," Respondent joined Petitioner in asserting that if the sales were of tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, Petitioner's gross receipts from such sales are exempt from Emergency School Tax and Gross Receipts Tax as being sales in interstate commerce.

The New Mexico Attorney General in his Brief in Opposition to Petition for Writ of Certiorari in No. 928, stated:

> "While this document is entitled 'Brief in Opposition', Respondents wish to make it clear that they agree with Petitioner's position concerning the incorrectness of the New Mexico Court of Appeals decision on the second issue involved in Evco v. Jones, 81 N.M. 724, 472 P.2d 987 (1970)."

This Court, in its Writ of Certiorari ordered:

> ". . . that the judgment of the said Court of Appeals be vacated with costs, and that this cause be remanded to the Court of Appeals of the State of New Mexico for reconsideration in light of the position asserted by the Attorney General in the Brief in Opposition."

Upon the remand, the Court of Appeals of the State of New Mexico required further oral argument, and subsequently entered a new opinion, which concluded as follows:

> "We reinstate and reaffirm our opinion in Evco v. Jones, supra."

Both Petitioner and Respondents asserted the same position before this Court and upon the remand to the Court of Appeals of the State of New Mexico. Upon the subsequent Petition for Writ of Certiorari, the Attorney General of New Mexico responded to the Clerk of this Court:

> "I notify you that a Brief in Opposition to any Petition for Writ of Certiorari in the above-referenced cause will not be filed, because the Respondent does not oppose the Petition for Writ of Certiorari."

ARGUMENT

I.

Petitioner's Gross Receipts from Sales of Tangible Personal Property to Customers Outside the State of New Mexico, Where Delivery Is Made Outside the State of New Mexico, Are Exempt from New Mexico Emergency School Tax and New Mexico Gross Receipts Tax As Being Sales in Interstate Commerce.

Both the question presented and the applicable facts are set forth by the Court of Appeals in its first opinion as follows:

> "The taxpayer claims exemption here upon the ground that the imposition of the taxes would constitute a tax upon interstate commerce. Paragraph 9(j) of the Stipulation, as quoted, shows, and the taxpayer has so asserted in its Brief in Chief, that the contracts were negotiated and entered into outside the State of New Mexico, and the items of tangible personal property produced by the taxpayer pursuant to these contracts were delivered outside New Mexico. However, the actual performance of all work in the production of

this property was accomplished by the taxpayer within New Mexico, where it maintains its principal office."

The Emergency School Tax Act, which was in effect during the first part of the taxable period, contains no provision with respect to exemption of transactions in interstate commerce. Likewise, the regulations thereunder contain no such provision.

For the taxable period after July 1, 1967, the Gross Receipts Tax Act provides:

"Sec. 72-16-A-14.10. Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution."

The Bureau of Revenue regulations promulgated under Sec. 72-16A-14.10 contained nothing specific with regard to either "inshipments" or "outshipments."

On December 5, 1969, after the close of the taxing period specifically involved, the Bureau of Revenue adopted a new regulation, interpreting the applicability of this section, as follows:

"Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where delivery is made out-of-state by seller's vehicle, U. S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller." G.R. Regulation 14.10-2.

Of this subsequent regulation the Court of Appeals stated:

"It appears this interpretation of the statute would clearly exempt the gross receipts from the sales in question from the Gross Receipts and Compensating Tax Act, but we are not required to determine whether this regulation is an invalid attempt to negate §72-16A-14.10, supra, because the regulation does not apply to the taxing period with which we are concerned."

The Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3, delegates to Congress the power "... to regulate commerce with foreign nations, and among the several states." Since the Constitution says nothing further with regard to what constitutes a regulation of interstate commerce, this determination has been worked out in a long series of decisions of this Court. It is submitted that the case of *J. D. Adams Manufacturing Co.* v. *Storen, et al.*, 304 U.S. 307, 58 S. Ct. 913, 82 L.Ed. 1365 (1938), is controlling in this case.

In *Adams Manufacturing Co.*, the State of Indiana attempted to impose a privilege tax measured by gross receipts upon a corporation engaged in the business of manufacturing road machinery in Indiana, and selling its products both within Indiana and in other states. The tax in question, which was described as a privilege tax upon the receipts of gross income from sales, was held to be void under the Commerce Clause. This Court explained that there are constitutionally permissible methods by which a state can exact compensation for business activities occurring within its boundaries, such as an excise tax on manufacturing, but that a privilege tax on sales to persons located outside the state is not one of them. In *Adams Manufacturing Co.*, there is a suggestion that the tax might have been constitutional if it had been apportioned, 304 U.S. 307, 314. This suggestion has not been followed in subsequent decisions of any courts, unless it is

being followed without citation by the Court of Appeals of New Mexico in this case. To the contrary, in *Freeman* v. *Hewitt*, 329 U.S. 249, 67 S. Ct. 274, 91 L.Ed. 265 (1946), a decision voiding the imposition of the same Indiana tax upon the receipts of an Indiana seller from the sale of securities through the New York Stock Exchange, the apportionment concept, as applied to receipts from selling, appears to be discarded. See *Freeman* v. *Hewitt*, supra, at p. 259 (Rutledge, J., concurring).

Chapter 34, "State Taxation of Interstate Commerce," The Report of the Special Subcommitte on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, pp. 1037-61 (June 30, 1965) analyzes the decisions of the entire subject area. In a section entitled "The Taxability of Sales of Goods Shipped out of the State," the Report concludes apparently upon the basis of *Adams Manufacturing Co.*:

> "Only if a tax is imposed on manufacturing, producing, or extracting may gross receipts from goods shipped out of the State be included in the measure of the tax. Otherwise, the State of origin may not tax outshipments." Supra, 1039.

In a per curiam opinion, this Court has held that Utah could impose a sales tax upon in-state sales, where the purchaser picked up the property in Utah and transported it out of state. Taxation of this transaction was considered constitutional since the passage of title and delivery took place within the State of Utah. *Utah Tax Commission* v. *Pacific States Cast Iron Pipe Co.*, 372 U.S. 605, 83 S. Ct. 925, 10 L.Ed. 2d 8 (1963).

Relying upon the *Adams Manufacturing Co.* case, the U. S. Court of Appeals for the Ninth Circuit has voided the imposition of a gross receipts tax by the Territory of Guam

upon receipts from sales of automobile parts to a purchaser located in the Philippines. Although the contract of sale was negotiated in Guam, delivery was to be made by the seller in the Philippines. *Manila Trading & Supply Co.* v. *Maddox*, 335 F.2d 150 (9th Cir., 1964).

In refusing to change its opinion upon the remand, the Court of Appeals of New Mexico first notes its determination that the taxpayer was involved in making sales of tangible personal property rather than in performance of services. It then goes on to state:

> "A resolution of the question, as to whether the State has exerted its power in proper proportion to the taxpayer's activities within the State and to its consequent enjoyment of the opportunities and protection which the State has afforded, should not be dependent upon whether the contract under which the activities are performed is a contract of sale or a contract for services. The State may properly exact a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. General Motors Corporation v. Washington, 377 U.S. 436, 84 S. Ct. 1564, 12 L.Ed.2d 430 (1964); Bell Telephone Laboratories v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966). We fail to understand how a tax on this aspect of interstate commerce can be constitutionally fair and valid if the incidents arise out of a contract for services, but constitutionally unfair and invalid when these same incidents arise out of a contract of sale."

In the *Bell Telephone Laboratories* case, it was held that the Emergency School Tax could be imposed upon a foreign corporation's receipts derived from military contracts for the construction of missile systems, even though the only work performed in New Mexico in fulfilling these

contracts was their testing. The New Mexico Supreme Court determined that the Commerce Clause of the U. S. Constitution was not violated because testing was a separable activity, and the tax was imposed only upon those receipts derived from testing in New Mexico. The activities involved were clearly performance of services.

In the *General Motors Corporation* case, this Court held that although a tax measured by gross receipts is invalid unless it is fairly apportioned to the taxing state, the Washington business and occupation tax was not unfairly related to the taxpayer corporation's numerous and complex operations in Washington. The tax was imposed upon "inshipments" rather than "outshipments." The taxpayer sought to avoid the tax upon its claim that it would be subjected to multiple taxation. However, it failed to show a definite burden of taxation, in a constitutional sense, either by St. Louis or the State of Oregon.

Petitioner has found no recent decisions relating to constitutionality of tax on "outshipments." Respondents suggested in a brief below that perhaps this could be explained by the fact that most states have assumed that they were without power to tax sales of goods where delivery occurs outside the state, and that such states have accepted these transactions from the general operation of their taxing statutes. This appears also to be what New Mexico has done with respect to G. R. Regulation 14.10-2, supra, which regulation appears to be based upon the clear authority of this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Writ of Certiorari which has been granted herein specifically reverse the Court of Appeals of the State of New Mexico, and that this Court specifically direct that final judgment be entered pursuant to the decision of this Court.

Respectfully submitted,

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